

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION**

AMERICAN WHITEWATER,
AMERICAN CANOE ASSOCIATION,
GEORGIA CANOEING ASSOCIATION,
ATLANTA WHITEWATER CLUB,
WESTERN CAROLINA PADDLERS,
FOOTHILLS PADDLING CLUB, Joseph
C. STUBBS, Kenneth L. STRICKLAND,
and Bruce A. HARE,

Plaintiffs,

v.

THOMAS TIDWELL, in his official
capacity as Chief of the United States Forest
Service; the UNITED STATES FOREST
SERVICE, an agency of the United States
Department of Agriculture; THOMAS
VILSACK, in his official capacity as
Secretary of the United States Department
of Agriculture; and the UNITED STATES
DEPARTMENT OF AGRICULTURE,

Defendants.

Civil Action No. 09-cv-02665-RBH

**MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

COME NOW the above-captioned Plaintiffs and file this, their Motion for Temporary Restraining Order and Preliminary Injunction, pursuant to Federal Rule of Civil Procedure 65. Plaintiffs request a one-hour hearing on or before Friday morning, October 16, 2009 to avoid irreparable injury to Plaintiffs' substantive and procedural rights. Defendants instituted a deadline of Friday afternoon, October 16, 2009 by which parties must seek administrative relief from the agency action underlying this suit. As explained in the supporting Memorandum of

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Law, however, the administrative appeal process has already concluded and should therefore not preclude immediate judicial review. Despite this action's ripeness for judicial review, Defendants are advocating, and seeming to require, further administrative appeal. Consequently, Plaintiffs need emergency relief from this Court before the Defendants' October 16, 2009 administrative filing deadline to avoid potentially waiving their right to challenge Defendants' violation of federal law.¹ Plaintiffs also seek emergency relief due to the ongoing irreparable injuries described below and in the Memorandum of Law.

Plaintiffs bring the instant action because the United States Department of Agriculture ("USDA"), through the United States Forest Service ("USFS"), has unlawfully infringed on Plaintiffs' federally-protected right to use and enjoy the Chattooga Wild and Scenic River (the "Chattooga") upstream of Highway 28 (the "Headwaters") through hand-powered floating.²

Defendants' violations are simple:

1. The Wild and Scenic Rivers Act ("WSRA") requires that administering agencies "protect and enhance" the "values" which caused a river to be included in the National Wild and Scenic Rivers System;³ and
2. Congress specifically identified canoe and kayak recreation on the Headwaters as a value which caused the river to be included in the National Wild and Scenic Rivers System; yet
3. The USFS currently bans all floating on the Headwaters (with one *de minimus* exception).

¹ If Plaintiffs file an administrative appeal by the USFS-imposed October 16, 2009 deadline, they potentially waive their right to challenge to the impropriety of the entire administrative appeal process before this Court. If Plaintiffs do not file an administrative appeal by October 16, 2009, Plaintiffs risk a subsequent judicial determination that the administrative appeal process is valid and that Plaintiffs are barred from seeking relief because they failed to timely file an administrative appeal. Under either scenario, Plaintiffs continue to suffer irreparable injury.

² Plaintiffs use the term "floating" to refer to all types of non-commercial, non-motorized methods of river floating or boating, including kayaking, canoeing and rafting.

³ 16 U.S.C. § 1281.

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In addition to violating the WSRA,⁴ Defendants' actions violate the Wilderness Act,⁵ the Multiple-Use Sustained-Yield Act,⁶ the Forest and Rangeland Renewable Resources Planning Act,⁷ the National Forest Management Act⁸ and its implementing regulations,⁹ the Administrative Procedures Act ("APA"),¹⁰ and the National Environmental Policy Act¹¹ and its implementing regulations.¹² Each of these violations is addressed in the accompanying Memorandum of Law and Verified Complaint filed contemporaneously with this Motion and incorporated herein. These unlawful actions are causing irreparable damage to the Plaintiffs, the members of the Plaintiff organizations, and the floating public.

Defendants replaced one unlawful floating prohibition with another unlawful floating prohibition. In doing so, Defendants acted arbitrarily and capriciously, abused their discretion, and acted not in accordance with the law. Specifically, in contravention of its own findings and governing law, the USFS responded to the USFS Chief's 2005 final administrative decision reversing the USFS's 2004 Headwaters floating ban by issuing an amendment to its 2004 Revised Land and Resource Management Plan (the "2009 Amendment"). The 2009 Amendment effectively perpetuates the unlawful floating ban by maintaining an absolute ban on floating two-

⁴ 16 U.S.C. § 1271 *et seq.*

⁵ 16 U.S.C. § 1131 *et seq.*

⁶ 16 U.S.C. § 528 *et seq.*

⁷ 16 U.S.C. §§ 1600-14.

⁸ 16 U.S.C. § 1600 *et seq.*

⁹ 36 C.F.R. 219.1-219.29.

¹⁰ 5 U.S.C. §§ 551-706.

¹¹ 42 U.S.C. §§ 4321-4370.

¹² 40 C.F.R. 1500-08.

thirds of the Headwaters. On the other third, the 2009 Amendment bans floating with the exception of approximately six days per year over three winter months. In addition to being issued by the improper USFS officer and not being based on the required use capacity analysis, the 2009 Amendment remains an unlawful ban on Headwaters floating from which Plaintiffs are entitled to immediate injunctive relief.

Because this action is ripe for judicial review, and because Plaintiffs' claims satisfy the standards for issuing preliminary injunctive relief, as discussed in the accompanying Memorandum of Law, and pursuant to Federal Rule of Civil Procedure 65, Plaintiffs respectfully request that this Court grant a Temporary Restraining Order and a Preliminary Injunction that: (1) finds that the 2009 Amendment is Defendants' final administrative action in this matter and that Plaintiffs' claims are ripe for judicial review; (2) enjoins Defendants from enforcing any of their Headwaters floating prohibitions, including the most recent Amendment #1 to the Revised Land and Resource Management Plans for each of the Sumter, Nantahala, and Chattahoochee National Forests; and (3) orders Defendants to withdraw or remove any portions of the Revised Land and Resource Management Plans for each of the Sumter, Nantahala, and Chattahoochee National Forests that implement a ban of any kind on floating the Chattooga.

Respectfully submitted,

October 14, 2009;
Greenville, South Carolina

NELSON GALBREATH, LLC

/s/ J. Nathan Galbreath

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ATTORNEYS FOR PLAINTIFFS

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CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Motion for Temporary Restraining Order and Preliminary Injunction was served on all parties, pursuant to Fed. R. Civ. P. 5(b)(2)(B), today, October 14, 2009.

/s/ J. Nathan Galbreath

J. Nathan Galbreath

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